

R. W. Bozel Transfer, Inc. and Truck Drivers, Helpers, Taxicab Drivers, Garage Employees and Airport Employees, Local Union 355, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner. Case 5-RC-13460

August 22, 1991

DECISION ON REVIEW, DIRECTION, AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

At issue here, on review of the Regional Director's Decision and Direction of Election,¹ is whether the five owner-operators whose status is contested are independent contractors or employees of the Employer and whether they should be included in the petitioned-for bargaining unit.²

The Board has considered the entire record in this case and makes the following findings.

Bozel is a Maryland corporation engaged in the interstate trucking of refrigerated goods to and between points from Connecticut to North Carolina. Bozel employs 18 employee-drivers in addition to the 5 owner-operators whose status is disputed.³ Bozel owns and operates one terminal in Baltimore, Maryland, through which all freight is routed. In addition, down the street from the terminal Bozel rents space where it parks some of its equipment and the owner-operators park their vehicles. Bozel also maintains a small yard in Richmond, Virginia, where drivers park and switch trailers. When freight is picked up from a customer, it is brought back to the Baltimore terminal where it is unloaded and then reloaded on a trailer designated for a particular geographic area. All drivers are assigned to a specific geographic area and to a specific tractor.

The Regional Director found that the five owner-operators at issue here are independent contractors and that they should be excluded from the bargaining unit.⁴ The Employer contends that the Regional Director's

findings are erroneous. For the reasons set out below, we agree with the Employer that the record does not establish that the owner-operators are independent contractors and find that the owner-operators should be included in the bargaining unit as employees of the Employer.

Initially, the Regional Director observed that the Board applies the common law right of control test to determine whether individuals are employees or independent contractors. In this regard, the Regional Director stated that the owner-operators own their own tractors and that under common law principles a worker's ownership of his own tools is evidence that the worker is not a servant.⁵ As to the entrepreneurial interests of the owner-operators, the Regional Director emphasized that in general the owner-operators are compensated on a commission basis by the job, not by the hour as are the employee-drivers, and that the owner-operators can negotiate their commissions.⁶ The Regional Director also found it significant that the Employer does not guarantee the owner-operators a minimum income nor provide them with any retirement, health insurance, or workman's compensation benefits as it does the employee-drivers.⁷ Finally, the Regional Director observed that the owner-operators do not clock-in as do the hourly employees, that they hire their own assistants (known as "lumpers") to help load and unload the trailers, and that they pay their own expenses. Thus, the Regional Director stated he was "constrained to conclude" that the owner-operators are independent contractors and should be excluded from the unit.

In his analysis, the Regional Director erred primarily by failing to consider adequately the Employer's extensive day-to-day control of the manner and means by which the owner-operators perform their work and by according too much weight to the fact that the owner-operators own their own trucks. As to the right of control,⁸ it is clear that Bozel exercises the same extensive

¹On December 12, 1990, the Regional Director for Region 5 issued a Decision and Direction of Election. On January 9, 1991, the Board granted the Employer's request for review solely with respect to the issue of whether the owner-operators are independent contractors. In all other respects, the Board denied the Employer's and the Petitioner's respective requests for review. An election was conducted on January 7, 1991. The ballots were impounded pending the Board's Decision on Review.

²The Regional Director found appropriate a unit of all full-time and regular part-time drivers and dispatchers employed by the Employer from its Baltimore, Maryland facility, excluding all other employees, owner-operators, platform men, casual employees, guards and supervisors as defined in the Act.

³The term "owner-operators" refers to the five drivers whose status is in dispute. The term "employee-drivers" refers to the 18 employees whom the Petitioner seeks to include in the unit. The term "drivers" includes both the employee-drivers and the owner-operators.

⁴Sam Bailey, Ahrens, Brumwell, Banks, and Paige are the five owner-operators whose status is disputed. The parties agreed that a sixth owner-operator, Steve Bailey, is an independent contractor. Accordingly, his status is not in dispute here.

⁵The Regional Director cited Restatement 2d, Agency § 220(2) Comment k (1958), for the proposition that "ownership of the instrumentalities and tools used in the work is of importance in determining whether a person is an independent contractor" and *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1327 (D.C. Cir. 1971), for the proposition that a worker's supplying of his own tools is evidence that the worker is not a servant.

⁶The Regional Director noted that when the owner-operators' tractors are out of service and they use the Employer's vehicles to perform their work, they are paid on an hourly basis as are the employee-drivers.

⁷The Regional Director noted that the owner-operators are responsible for the maintenance and upkeep of their vehicles, for unemployment compensation, and that they are not eligible for other employee benefits such as vacations, sick leave, holiday pay, or employer-provided health insurance.

⁸In *Gary Enterprises*, 300 NLRB 1111, 1112 (1990), the Board reiterated the right-of-control test:

If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person who performs the services is an independent contractor.

Among the factors that the Board considers in applying the right of control test are, as stated by the Regional Director, "the degree to which the work being performed is integral to the employer's operation; the degree to which

day-to-day control over the owner-operators that it does over its employee-drivers. In this regard, we note that the owner-operators are assigned to predetermined runs, that they cannot refuse an assignment, and that they haul exclusively for Bozel. We also observe that Bozel arranges the schedule of deliveries and that the owner-operators cannot deviate from it. Further, we note that the Bozel family members who supervise the employee-drivers also supervise the owner-operators, that the owner-operators are subject to the same discipline as the employee-drivers, and that the Employer has suspended owner-operators in the past for infractions of its rules. Thus, we find that the evidence supports a finding that the Employer exercises pervasive day-to-day control over the manner and means by which the owner-operators carry out their duties.⁹

As to the owner-operators' providing their own trucks, the Regional Director, citing *Joint Council of Teamsters No. 42 v. NLRB*, supra, relied heavily on this factor in finding that the individuals at issue were independent contractors. We note, however, that in that case the court affirmed the Board's finding that the owner-operators at issue were employees and not independent contractors, and did so primarily on the ground that the contractors for whom the owner-operators worked exercised extensive control over how the owner-operators performed their work. Because, as explained above, we have found that Bozel exercises extensive control over the manner and means by which the owner-operators perform their work, we reach the same conclusion here.¹⁰

With regard to the owner-operators' commission and their ability to negotiate fees, as the Regional Director noted, the owner-operators have no proprietary interest in their routes and the charges for pickup and delivery of freight are determined by the Employer and the customer. Thus, the owner-operators, who are paid a percentage of the charges, play no part in deciding what the charges should be and, ultimately, what they will be paid for a run.¹¹ Although the owner-operators can negotiate an increase in the commission fee, the evi-

dence indicates that such negotiations are unusual.¹² Moreover, in such cases the owner-operators only negotiate with the Employer over a fee increase after they have made the scheduled run and the owner-operators cannot refuse to make a scheduled run because of a pay dispute.¹³ In addition, we note that the owner-operators are restricted from seeking employment from other trucking companies while they are working for Bozel. Thus, we find, contrary to the Regional Director, that the evidence fails to establish that the owner-operators exercise sufficient entrepreneurial initiative to warrant a finding that they are independent contractors.

Finally, while we agree with the Regional Director that the owner-operators hire and usually pay their own lumpers, we do not find that this fact evidences an exercise of discretion sufficient to warrant a finding that the owner-operators are independent contractors. In this regard, we note that Patrick Bozel testified without contradiction that the lumpers were usually young men who waited at the dock for an opportunity to load or unload shipments and that the drivers hired them on the spot for a specific job and paid them in cash.¹⁴ In addition, owner-operator Ahrens testified without contradiction that he hires a lumper about four or five times a month and that he usually pays the lumper himself although on occasion Bozel would split the lumper's fee with him.¹⁵ In these circumstances, we find the fact that the owner-operators occasionally hire and pay lumpers insufficient to establish that they are independent contractors.¹⁶

Thus, as noted above, we conclude that Bozel's pervasive control of the manner and means by which the owner-operators perform their work and the owner-operators' lack of entrepreneurial freedom require a finding that the owner-operators are employees of Bozel and not independent contractors.¹⁷ As we have con-

the worker has a proprietary or equity interest that is enhanced by the good will his efforts generate; the degree of skill required; the degree to which work opportunities are restricted to one particular work relationship; and the degree to which the worker possesses other entrepreneurial characteristics." See also *Gary Enterprises*, supra at 1112.

⁹*Precision Bulk Transport*, 279 NLRB 437 (1986), and *Don Bass Trucking*, 275 NLRB 1172 (1985), relied on by the Regional Director, are distinguishable. In those cases the Board found that the employers did not control the manner and means by which the owner-operators performed their services. Thus, in both cases the owner-operators were free to work according to their own schedules, accept or reject specific work assignments, and to follow delivery routes of their own choosing.

¹⁰In reaching this conclusion, we note that the trucks leased by the owner-operators to Bozel are required to display the sign "leased to R. W. Bozel Transfer, Inc." The Board has found that a requirement that owner-operators display the employer's logo on their trucks is evidence of the employer's control over the daily regimen of the owner-operators. See *Roadway Package System*, 288 NLRB 196, 198 (1988).

¹¹Of the five owner-operators, we note that one, Paige, drives a local run and is paid by the day, not by commission.

¹²Owner-operator Ahrens testified without contradiction that he negotiated a fee for a load approximately once a month and that because he did not know what the commission fee would be until he had completed a trip, he made his decision to negotiate the fee after his return from a trip if he found that the commission fee was not enough "to justify the trip."

¹³Patrick Bozel testified without contradiction that the owner-operators never refuse a trip because of the commission fee involved but that they may negotiate the fee after the trip has been run.

¹⁴Both the driver-employees and the owner-operators hire the lumpers and pay them in cash. If a driver-employee sought permission from Bozel to hire a lumper and Bozel approved, Bozel reimburses the driver-employee. If the driver-employee failed to get such permission, he usually is not reimbursed.

¹⁵In this regard, Ahrens testified without contradiction that if he needed to unload quickly because of a time requirement, he would call Patrick Bozel and Bozel would usually tell him to hire a lumper with Bozel splitting the fee.

¹⁶See *Roadway Package System*, supra at 199, where the Board, having considered factors that militated in favor of finding that the drivers were independent contractors, including the fact that the drivers were free to hire "helpers" or "jumpers," found that the drivers were employees because of "the Employer's significant control over the manner and means of performing the pickup and delivery of packages and the drivers' relative lack of entrepreneurial freedom."

¹⁷Although we agree with the Regional Director that the owner-operators do not share the same benefits as the driver-employees, that they pay for all costs associated with the maintenance and upkeep of their tractors, and that

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cluded that the owner-operators are employees of Bozel, we shall include them in the bargaining unit. Accordingly, we find that the following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(c) of the Act:

All full-time and regular part-time drivers, including owner-operators, and dispatchers employed by the Employer from its Baltimore, Maryland facility, excluding all other employees, platform men,

Bozel does not deduct taxes from their wages, we find these facts insufficient to establish independent contractor status in view of our findings above. See *Roadway Package System*, supra at 199. Finally, although the lease agreements between the owner-operators and Bozel indicate on their face an independent contractor arrangement, the record clearly establishes, as explained above, that the owner-operators are in fact Bozel's employees. See *Mission Foods Corp.*, 280 NLRB 251, 252 (1986).

casual employees, guards and supervisors as defined in the Act.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 5 shall, within 14 days of this Decision on Review and Direction, open and count the impounded ballots cast by the employees in the above-described unit, prepare and serve on the parties a tally of ballots, and thereafter issue the appropriate certification.

ORDER

It is ordered that the above-entitled matter is remanded to the Regional Director for Region 5 for further processing consistent herewith.